

SERVICE DATE – JULY 31, 2015

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35832

CSX TRANSPORTATION, INC.—PETITION FOR DECLARATORY ORDER

Digest:¹ CSX Transportation, Inc., requests an order declaring that the claims of HAMP, Inc., which is seeking compensation under Virginia state law from CSXT for flooding and property damage allegedly caused by the negligent maintenance of CSXT's rail line, are preempted by 49 U.S.C. § 10501(b). In this decision, the Board denies CSXT's petition for a declaratory order, but provides guidance on the question of preemption.

Decided: July 29, 2015

CSX Transportation, Inc. (CSXT), seeks an order from the Board declaring that the state court claims filed by HAMP, Inc. (HAMP), against CSXT, alleging negligence, nuisance, trespass, inverse condemnation, and violation of various sections of the Virginia Code, are preempted by 49 U.S.C. § 10501(b) of the Interstate Commerce Act (ICA), as broadened in the ICC Termination Act of 1995 (ICCTA). For the reasons discussed below, the Board denies CSXT's petition, but provides guidance on the preemption issue.

BACKGROUND

HAMP filed a lawsuit in the Circuit Court of Prince William County, Va., seeking compensation for property damage allegedly caused by CSXT in connection with a flood that occurred in September 2011. In response, CSXT requested that the state court grant a stay of that proceeding to allow CSXT to seek a ruling from the Board on whether HAMP's claims are preempted under 49 U.S.C. § 10501(b).² On June 3, 2014, CSXT filed a petition for declaratory

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² Neither party has filed an update with the Board regarding the status of CSXT's request for a stay or the status of the state court proceeding in general.

order with the Board requesting such a ruling. HAMP replied on June 23, 2014, arguing that its state law claims are not federally preempted.³

HAMP owns Holly Acres Mobile Home Park (Holly Acres), located in Woodbridge, Va., adjacent to the CSXT rail line at issue (the Line). CSXT states that, since at least 1902, it has maintained the Line on which it operates trains in the area across a 40-foot tall and 150-foot wide berm that crosses Marumsco Creek (the Creek).⁴ CSXT also states that it constructed a 12-foot concrete arch culvert through the berm to permit the flow of the Creek.⁵ HAMP alleges that CSXT has not maintained the culvert, which HAMP believes has resulted in the culvert filling up with sediment, rocks, and debris.⁶ HAMP further alleges that CSXT has not widened the culvert nor has it built additional tunnels through the berm to support the natural flow of the Creek.⁷ According to HAMP, the Creek is a major conduit for storm water drainage for a substantial area of Prince William County, Va., and without the natural flow, the water is impeded by the berm at the culvert, causing the water to back up and accumulate in Holly Acres.⁸

The parties both acknowledge that on September 8 and 9, 2011, Tropical Storm Lee produced significant rainfall in Prince William County.⁹ HAMP alleges that, as a result of CSXT's failure to maintain the berm and culvert, runoff accumulated in the Creek, and consequently much of Holly Acre's infrastructure, water and sewer pipes, and concrete pad sites, as well as 67 mobile homes, were destroyed.¹⁰

HAMP's complaint in state court seeks damages from CSXT for negligence, trespass, nuisance, and inverse condemnation under Virginia state law, as well as a declaratory judgment under Virginia Code §§ 8.01-184 and 187, regarding dams and impounding structures.¹¹ In

³ On July 31, 2014, HAMP filed a certificate of discovery, stating that HAMP had issued interrogatories and requests for production of documents to CSXT. CSXT filed a response on August 4, 2014, arguing that because the Board had yet to act on CSXT's petition for declaratory order or to initiate a proceeding, CSXT would not respond to HAMP's discovery requests. On August 14, 2014, HAMP filed a motion to compel CSXT to respond to HAMP's interrogatories and requests for production of documents. CSXT responded on September 4, 2014, arguing that HAMP's motion was premature. Because we are denying CSXT's petition for declaratory order and not instituting a proceeding, HAMP's motion to compel is denied as moot.

⁴ Pet. 1.

⁵ Id. at 1-2.

⁶ Reply 3.

⁷ Id. at 3.

⁸ Id. at 3.

⁹ Pet. 2; Reply 4.

¹⁰ Reply 4.

¹¹ Id. at Ex. 1.

response to the complaint, CSXT filed a motion to stay the state court action pending the decision of the Board on CSXT's petition for declaratory order, a demurrer seeking dismissal of the claim, and a plea in bar asserting that HAMP's complaint is barred by § 10501(b).¹²

In its petition for declaratory order, CSXT alleges that HAMP's claims are preempted by § 10501(b), arguing that HAMP's complaint asks the state court to regulate directly CSXT's railroad activities, including the design and operation of its culverts and bridges.¹³ In response, HAMP argues that its claims are not preempted, because § 10501(b) does not strip state and local governments of certain police powers to protect public health and safety, and consequently that its state law claims can proceed.¹⁴

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. The Board has broad discretion in determining whether to issue a declaratory order. See Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C. 2d 675 (1989). Here, the status of the litigation between HAMP and CSXT in state court is unclear. The record does not indicate whether the state court stayed its proceedings in response to CSXT's request or whether discovery or other proceedings are ongoing in the state court. As we have explained, questions of federal preemption under 49 U.S.C. § 10501(b) can be decided by the Board or the courts. See, e.g., 14500 Ltd.—Pet. for Declaratory Order (14500), FD 35788, slip op. at 2 (STB served June 5, 2014); CSX Transp., Inc.—Pet. for Declaratory Order, FD 34662, slip op. at 8 (STB served May 3, 2005). In addition, where the law is clear, the Board may decline to institute a proceeding and instead provide guidance on the preemption issue. See 14500, slip op. at 2. The Board and the courts have decided in a number of cases that § 10501(b) preempts state and local attempts to regulate the design, construction, maintenance, and repair of rail lines and their associated structures. Because there is abundant case law addressing preemption of state and local claims involving railroad design, construction, and maintenance, and the status of the state court proceedings here is unclear, we deny CSXT's petition for a declaratory order, but provide the following guidance on preemption.

The ICA gives the Board broad and exclusive jurisdiction over “transportation by rail carrier.” 49 U.S.C. § 10501(a)(1). The statute defines rail transportation expansively to encompass any property, facility, structure or equipment “related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use.” 49 U.S.C. § 10102(9). Moreover, § 10102(6) defines “railroad” broadly to include “a switch, spur, track, terminal, terminal facility, [or] a freight depot, yard [or] ground, used or necessary for transportation.”

¹² Reply Ex. 2.

¹³ Pet. 3.

¹⁴ Reply 8-9.

Section 10501(b) categorically preempts states or localities from intruding into matters that are directly regulated by the Board (e.g., railroad rates, services, construction, or abandonment). It also prevents states or localities from imposing requirements that, by their nature, could be used to deny a railroad's right to conduct rail operations or proceed with activities the Board has authorized, such as a construction or abandonment. Thus, state and local permitting or preclearance requirements, including building permits and zoning ordinances are categorically preempted. City of Auburn v. STB, 154 F.3d 1025, 1029-31 (9th Cir. 1998). Otherwise, state and local authorities could deny a railroad the right to construct or maintain its facilities or to conduct its operations, which would irreconcilably conflict with the Board's authorization of those facilities and operations. Id. at 1031; CSX Transp., Inc.—Pet. for Declaratory Order, FD 34662, slip op. at 8-10 (STB served Mar. 14, 2005), pet. for recon. denied (STB served May 3, 2005). State and local actions also may be preempted “as applied”—that is, if they would have the effect of unreasonably burdening or interfering with rail transportation. See Franks Inv. Co. v. Union Pac. R.R. (Franks), 593 F.3d 404, 414 (5th Cir. 2010) (en banc).

Section 10501(b) expressly states that “the remedies provided under [49 U.S.C. § 10101-11908] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” Section 10501(b) thus preempts other regulation that would unreasonably interfere with railroad operations that come within the Board's jurisdiction, without regard to whether or not the Board actively regulates the particular activity involved. See Pace v. CSX Transp., Inc., 613 F.3d 1066, 1068-69 (11th Cir. 2010) (state law claims related to side track preempted); Port City Props. v. Union Pac. R.R., 518 F.3d 1186, 1188 (10th Cir. 2008) (state law claims preempted even though Board does not actively regulate spur and side track).

The purpose of § 10501(b) preemption is to prevent a patchwork of state and local regulation from unreasonably interfering with interstate commerce. Norfolk S. Ry.—Pet. for Declaratory Order, FD 35701, slip op. at 4, 6 n.14 (STB served Nov. 4, 2013), citing H.R. Rep. No. 104-311, at 95-96 (1995). The interstate rail network could not function properly if states and localities could impose their own potentially differing standards for railroad activities that are an integral part of, and directly affect, rail transportation.

While § 10501(b) is broad and far-reaching, there are limits. For example, § 10501(b) preemption does not apply to state or local actions taken under their retained police powers, as long as they do not unreasonably interfere with railroad operations or the Board's regulatory programs. See Green Mountain R.R. v. Vermont, 404 F.3d 638, 643 (2d Cir. 2005); N.Y. Susquehanna & W. Ry. v. Jackson, 500 F.3d 238, 252-54 (3d Cir. 2007).

The Board and a number of courts have addressed § 10501(b) preemption of state and local attempts to regulate the design, construction, and maintenance of rail lines and rail transportation facilities. See, e.g., Thomas Tubbs—Pet. for Declaratory Order, FD 35792, slip op. at 4-5 (STB served Oct. 31, 2014) (state law claims regarding the design and construction of a rail line were preempted, but not those claims based upon nationwide standards in the Federal Railroad Safety Act), pet. for review pending, Tubbs v. STB, No. 14-3898 (8th Cir.); Tex. Cent. Bus. Lines Corp. v. City of Midlothian, 669 F.3d 525, 533 (5th Cir. 2012) (city's attempted regulation of railroad embankment construction preempted); Maynard v. CSX Transp., Inc.,

360 F. Supp. 2d 836, 841-42 (E.D. Ky. 2004) (negligence claims related to flooding allegedly caused by construction and maintenance of tracks preempted); Pere Marquette Hotel Partners, L.L.C. v. United States, 2010 WL 925297 at *5-6 (E.D. La. March 10, 2010) (claims that a railroad negligently designed and constructed railroad crossing, railroad tracks, and roadbed for railroad tracks qualify as an attempt at state law “regulation” and are preempted); In re Katrina Canal Breaches Consol. Litigation, 2009 WL 224072 (E.D. La. 2009) (negligence claims related to flooding allegedly caused by design and construction of railroad crossing, tracks, and roadbed preempted); A&W Props., Inc. v. Kan. City S. Ry., 200 S.W.3d 342, 347-49 (Tex. Ct. App. 2006) (tort claims related to the design of track drainage structures preempted). Cf. Rushing v. Kan. City S. Ry., 194 F. Supp. 2d 493, 500-01 (S.D. Miss. 2001) (tort claims related to railroad’s activities preempted, but claims related to earthen berm adjacent to rail yard allowed to proceed, as berm was not directly related to railroad’s operations).

Whether § 10501(b) preempts HAMP’s claims of negligence, trespass, nuisance, and inverse condemnation under Virginia state law, as well as its request for a declaratory judgment under Virginia Code §§ 8.01-184 and 187, will likely depend on how the facts and circumstances as determined in the state court action fit within the case law discussed above.

It is ordered:

1. CSXT’s request for a declaratory order is denied.
2. HAMP’s motion to compel is denied as moot.
3. This decision is effective on its date of service.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Miller.